Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

DAVID L. SMITH,

Petitioner,

v.

MAIL-WELL ENVELOPE COMPANY, BUTLER PAPER COMPANY, GEORGIA-PACIFIC CORPORATION, GREAT NORTHERN NEKOOSA CORPORATION EMPLOYEE PROTECTION PLAN,

Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

DAVID L. SMITH

1630 Welton Street, Suite 300
Denver, Colorado 80202
(303) 534-0153

PRO SE ATTORNEY-PETITIONER

61 pp

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Order issued by United States District Judge Zita L. Weinshienk on June 17, 1994 staying Ms. Howard's civil rights case "until final action is taken on the Committee on Conduct's recommendation concerning plaintiff's counsel's status," and vacating the jury trial scheduled to commence on August 1, 1994 . . . SA-1

Order issued by the United States Court of Appeals for the Tenth Circuit on November 15, 1994 dismissing for lack of jurisdiction Ms. Howard's and Mr. Smith's appeal of Judge Weinshienk's (June 17, 1994) order, and referring appellees' request for sanctions to the three-judge Tenth Circuit disciplinary panel SA-4

Disciplinary Order issued by the three-judge disciplinary panel of the United States District Court for the District of Colorado (including Judge Weinshienk) on February 10, 1995 suspending Mr. Smith from the practice of law in the District Court until he pays more than $50,000.00 in harsh and unjustified sanctions imposed against him by the Tenth Circuit and by the District Court (including Judge Weinshienk) SA-7

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Order issued by Judge Weinshienk on September 7, 1995 granting defendants' application for attorney fees, and imposing attorney fee sanctions of $8,640.00 against Mr. Smith exclusively for filing and pursuing the appeal of her (June 17, 1994) order; treating Ms. Howard's and Mr. Smith's motion to clarify status of legal representation, and notice of Ms. Howard's inability to comply with Judge Weinshienk's (July 21, 1995) amended minute order as a pro se motion for extension of time to secure new counsel, and granting the motion to September 22, 1995; announcing that "[p]laintiff will be presumed to be handling this case pro se until new counsel enters an appearance," and that

"this Court will no longer accept any papers which have been signed by Mr. Smith"; and refusing to rule on Ms. Howard's and Mr. Smith's request for proper notice, an opportunity to file a brief and a hearing after the Tenth Circuit has disposed of their appeal in this case (including their petition for rehearing and suggestion for rehearing en banc), and has issued its mandate pursuant to Fed. R. App. P. 41(a) SA-34

Order issued by the Tenth Circuit on February 26, 1996 dismissing for lack of jurisdiction Ms. Howard's and Mr. Smith's appeal of Judge Weinshienk's (May 15, 1995, July 21, 1995, and September 7, 1995) orders, except for the jurisdictional issue relating to the attorney fee sanctions of $8,640.00 imposed against Mr. Smith exclusively for filing and pursuing the appeal of Judge Weinshienk's (June 17, 1994) order, and denying Ms. Howard's and Mr. Smith's "Verified Motion for an Emergency Stay of Proceedings in the District Court Pending Appeal" . . . SA-38

Ms. Howard's and Mr. Smith's "Petition for Rehearing; Motion for an Emergency Stay of Proceedings in the District Court Pending Resolution of Petition for Rehearing; Request for Order Permitting Mr. Smith to Represent Ms. Howard in the Tenth Circuit and in the District Court on a Hardship Basis; and Suggestion for Rehearing En Banc" (filed on March 11, 1996) . A-41

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 93-Z-1895 [June 17, 1994]

LINDA C. HOWARD,

Plaintiff,

v.

MAIL-WELL ENVELOPE COMPANY; BUTLER PAPER COMPANY; GEORGIA-PACIFIC CORPORATION; and GREAT NORTHERN NEKOOSA CORPORATION EMPLOYEE PROTECTION PLAN,

Defendants.

ORDER

The Committee on Conduct has made a recommendation concerning plaintiff's counsel's status in the United States District Court for the District of Colorado. After careful consideration, the Court determines that this case should be stayed pending final action by the District Court on the Committee's recommendation. Accordingly, it is

ORDERED that this case is stayed until final action is taken on the Committee On Conduct's recommendation concerning plaintiff's counsel's status. It is

FURTHER ORDERED that the status conference presently set on Thursday, July 7, 1994, is hereby vacated. It is

FURTHER ORDERED that the trial presently set to begin on Monday, August 1, 1994, is hereby vacated. It is

FURTHER ORDERED that a new trial date and status conference will be set after the stay in this case is lifted. It is

FURTHER ORDERED that plaintiff shall notify the Court and opposing counsel when such final action is taken by the District Court for the District of Colorado.

DATED at Denver, Colorado, this 17th day of June, 1994.

BY THE COURT:

_____

ZITA L. WEINSHIENK, Judge
United States District Court

June 17, 1994

Civil Action No. 93-Z-1895

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the above date copies of ORDER entered by Judge Zita L. Weinshienk and filed on June 17, 1994, were mailed to the following:

David L. Smith, Esq.
1630 Welton St., Suite 300
Denver, CO 80202

Brian M. Mumaugh, Esq.
Jeffrey T. Johnson, Esq.
Holland & Hart
D.C. Box No. 06

Randall A. Constantine, Esq.
Amy L. Lloyd, Esq.
Elrod & Thompson, P.C.
1500 Peachtree Center--South Tower
225 Peachtree Street, N.E.
Atlanta, Georgia 30303

Magistrate Judge Donald E. Abram

JAMES R. MANSPEAKER, Clerk

By:_____
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LINDA C. HOWARD,	)	[November 15, 1994]
	)	
Plaintiff-Appellant,	)	
	)	
DAVID L. SMITH,	)	
	)	
Appellant,	)	
	)	
v.	)	No. 94-1317
	)	
MAIL-WELL ENVELOPE COMPANY, BUTLER PAPER COMPANY, GEORGIA-PACIFIC CORPORATION GREAT NORTHERN NEKOOSA CORPORATION EMPLOYEE PROTECTION PLAN,	)	
	)	
Defendants-Appellees.	)	

ORDER

Filed: November 15, 1994

Before ANDERSON, BALDOCK, and KELLY, Circuit Judges.

This appeal is jurisdictionally defective because the order being appealed is not final. See 28 U.S.C. § 1291.

This is an appeal from an order of the district court staying the proceedings below until the status of plaintiff's counsel's right to practice before the district court is clarified.

A final decision is a decision that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Catlin v. United States, 324 U.S. 229, 233 (1945). "A stay is not ordinarily a final decision for purposes of § 1291, since most stays do not put the plaintiff 'effectively out of court.'" Moses H. Cone Memorial Hosp. v. Mercury Construction, Corp., 460 U.S. 1, 10 n. 11 (1983); see also Pioneer Properties, Inc. v. Martin, 776 F.2d 888, 890-891 (10th Cir. 1985).

The appellants argue that the order is an injunction, and thus appealable under 28 U.S.C. § 1292(a)(1). This argument is without merit. See Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 279 (1988) ("An order by a federal court that relates only to the conduct or progress of litigation before that court ordinarily is not considered an injunction and therefore is not appealable under § 1292(a)(1)"). See also Hamilton v. Robertson, 854 F.2d 740, 741 (5th Cir. 1988) (There is "a clean distinction between injunctions prohibiting proceedings in other courts, which are appealable, and orders, whether or not styled 'injunctions,' that control proceedings only in the court that issues the order. The latter are not appealable[.]").

The appellants' request for sanctions against the appellees is DENIED.

The appellees' request for sanctions is referred to the disciplinary panel.

APPEAL DISMISSED.

Entered for the Court
PATRICK FISHER
Chief Deputy Clerk

By:
Ellen Rich Reiter
Deputy Clerk/Appeals
Expediter

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[February 10, 1995]

Disciplinary Action No. 93-DP-28

IN THE MATTER OF DAVID L. SMITH

DISCIPLINARY ORDER

On February 2, 1995, this matter was heard before the Disciplinary Panel of this Court. After hearing arguments and statements of counsel, reviewing all transcripts, exhibits and other documents in this matter, and considering carefully the issues, it is

ORDERED that identical discipline will be imposed by the United States District Court as was imposed by the United States Court of Appeals for the Tenth Circuit. It is

FURTHER ORDERED that David L. Smith is suspended as a member of the Bar of this Court. It is

FURTHER ORDERED that when the United States Court of Appeals for the Tenth Circuit lifts its suspension of Mr. Smith, he shall be required to apply for reinstatement in accordance with D.C.COLO.LR 83.6N. of the Local Rules of Practice of this court. It is

FURTHER ORDERED that David L. Smith shall forward his certificate of admission to the Clerk of the Court within ten days

from the date of this Order and that he shall in no way hold himself out as an attorney admitted to practice in this court be it by use of letterhead, business cards, advertisement or any other manner.

Dated at Denver, Colorado this 10th day of February, 1995.

BY THE DISCIPLINARY PANEL OF THE COURT:

ZITA L. WEINSHIENK, Judge

EDWARD W. NOTTINGHAM, Judge

DANIEL B. SPARR, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Zita L. Weinshienk

Civil Action No. 93-Z-1895 [May 15, 1995]

LINDA C. HOWARD,

Plaintiff,

v.

MAIL-WELL ENVELOPE COMPANY; BUTLER PAPER COMPANY; GEORGIA-PACIFIC CORPORATION; and GREAT NORTHERN NEKOOSA CORPORATION EMPLOYEE PROTECTION PLAN,

Defendants.

MINUTE ORDER

ORDER ENTERED BY JUDGE ZITA L. WEINSHIENK

Joan E. Boline, Administrative Secretary

Dated: May 15, 1995

In light of the fact that David L. Smith is no longer authorized to practice law in the United States District Court for the District of Colorado, it is

ORDERED that plaintiff shall have until June 15, 1995, to secure new counsel in this case or notify the Court that she will represent herself in this matter. It is

FURTHER ORDERED that Defendants' Motion to Lift Stay And Set Status Conference is granted, and the stay in this case shall be lifted on June 15, 1995. It is

FURTHER ORDERED that a status conference in this case will be set shortly after new counsel enters on behalf of plaintiff.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LINDA C. HOWARD,	)	[July 18, 1995]
	)	
Plaintiff-Appellant,	)	
	)	
DAVID L. SMITH,	)	
	)	
Appellant,	)	
	)	
v.	)	No. 94-1317
	)	
MAIL-WELL ENVELOPE COMPANY, BUTLER PAPER COMPANY, GEORGIA-PACIFIC CORPORATION GREAT NORTHERN NEKOOSA CORPORATION EMPLOYEE PROTECTION PLAN,	)	
	)	
Defendants-Appellees.	)	
	)	

ORDER

Filed: July 18, 1995

Before SEYMOUR, Chief Judge, BALDOCK, and BRORBY, Circuit Judges.

Defendants-appellees requested sanctions in their motion to dismiss filed August 1, 1994. The request is granted and a sanction of double costs and attorney fees

is imposed. Appellees may file a cost bill within fourteen days of the date of this order. This matter is remanded to the district court to determine the amount of attorney fees on appeal to be awarded.

Entered for the Court

PATRICK FISHER, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Zita L. Weinshienk

Civil Action No. 93-Z-1895 [July 21, 1995]

LINDA C. HOWARD,

Plaintiff,

v.

MAIL-WELL ENVELOPE COMPANY; BUTLER PAPER COMPANY; GEORGIA-PACIFIC CORPORATION; and GREAT NORTHERN NEKOOSA CORPORATION EMPLOYEE PROTECTION PLAN,

Defendants.

AMENDED MINUTE ORDER

ORDER ENTERED BY JUDGE ZITA L. WEINSHIENK

Joan E. Boline, Administrative Secretary

Dated: July 21, 1995

In light of the fact that the Court inadvertently failed to mail its Minute Order of May 15, 1995, to plaintiff, it is

ORDERED that plaintiff shall have until August 15, 1995, to secure new counsel in this case or notify the Court that she will represent herself in this matter. It is

FURTHER ORDERED that the stay in this case shall be lifted on August 15, 1995. It is

FURTHER ORDERED that a status conference in this case will be set shortly after new counsel enters on behalf of plaintiff.

July 21, 1995

Civil Action No. 93-Z-1895

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the above date copies of AMENDED MINUTE ORDER entered by Judge Zita L. Weinshienk and filed on July 21, 1995, were mailed to the following:

Linda C. Howard
3600 Monroe
Denver, CO 80205
--w/copy of 5/15/95 MO

Brian M. Mumaugh, Esq.
Jeffrey T. Johnson, Esq.
Holland & Hart
D.C. Box No. 06

Randall A. Constantine, Esq.
Amy L. Lloyd, Esq.
Elrod & Thompson, P.C.
1500 Peachtree Center--South Tower
225 Peachtree Street, N.E.
Atlanta, Georgia 30303

Magistrate Judge Donald E. Abram

JAMES R. MANSPEAKER, Clerk

By:_____
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LINDA C. HOWARD,	)	
	)	
Plaintiff-Appellant,	)	
	)	
and,	)	
	)	
DAVID L. SMITH,	)	
	)	
Attorney-Appellant,	)	
	)	No. 94-1317
v.	)	(D.C. No. 93-Z-1895)
	)	(Dist. of Colo.)
MAIL-WELL ENVELOPE COMPANY; BUTLER PAPER COMPANY; GEORGIA-PACIFIC CORPORATION; GREAT NORTHERN NEKOOSA CORPORATION EMPLOYEE PROTECTION PLAN,	)	
	)	
Defendants-Appellees.	)	
	)	

PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

Linda C. Howard and her attorney, David L. Smith, hereby file the following petition for rehearing and suggestion for rehearing en banc:

I. STATEMENT OF THE CASE

On November 29, 1993, a three-judge disciplinary panel of the United States Court of Appeals for the Tenth Circuit issued its disciplinary order convicting Mr. Smith of filing "frivolous" appeals in four civil rights cases originally filed in the United States District Court for the District of Colorado: DeHerrera v. City and County of Denver, Civil Action No. 90-B-2260 (D. Colo.); Casillan v. Regional Transportation District, Civil Action No. 90-S-1722 (D. Colo.); Dunkin v. Louisiana-Pacific Corporation, Civil Action No. 92-N-243 (D. Colo.); Sandlin v. Canady, Civil Action No. 92-Z-313 (D. Colo.). See In re David L. Smith, 10 F.3d 723 (10th Cir. 1993). The Tenth Circuit disciplinary panel suspended Mr. Smith from the practice of law in the Tenth Circuit until all sanctions imposed against him by the Tenth Circuit and the District Court are paid. Mr. Smith may apply for reinstatement to the Tenth Circuit bar when he can demonstrate that each sanction order of the Tenth Circuit and the District Court has been satisfied.

On December 8, 1993, Mr. Smith was served with a letter from the lawyer-chairman of the Committee on Conduct of the United States District Court for the District of Colorado, notifying him that "pursuant to D.C.COLO.LR 83.6P., simultaneous and identical discipline shall be imposed by the United States District Court for the District of Colorado nunc pro tunc from the date of judgment of the United States Court of Appeals for the Tenth Circuit." Mr. Smith subsequently responded to the chairman's letter; and a meeting to

discuss the letter and response was held by a three-lawyer investigatory committee.

On or about May 6, 1994, Mr. Smith was served with the three-lawyer investigatory committee's letter recommendation with respect to his practice status in the United States District Court for the District of Colorado. Mr. Smith subsequently objected to the recommendation; and a hearing was ordered by the District Court's three-judge disciplinary panel, whose membership was composed of United States District Judges Sherman G. Finesilver, Jim R. Carrigan and Zita L. Weinshienk.

On September 21, 1994, the District Court disciplinary panel issued its disciplinary order staying its ruling on Mr. Smith's practice status pending resolution by the Supreme Court of the United States of his petition for a writ of certiorari to review the Tenth Circuit disciplinary panel's (November 29, 1993) disciplinary order. The District Court disciplinary panel ordered that "pending the decision of this panel and until further order of Court, Mr. Smith will not be suspended from the practice of law under D.C.COLO.LR 83.6P.1. in the United States District Court for the District of Colorado."

On October 3, 1994, the Supreme Court denied Mr. Smith's petition for a writ of certiorari to review the Tenth Circuit disciplinary panel's (November 29, 1993) disciplinary order.

On November 29, 1994, Mr. Smith filed his motion to vacate the Tenth Circuit disciplinary panel's (November 29, 1993) disciplinary order, arguing inter alia that

all sanctions imposed against him by the Tenth Circuit for filing immediate appeals of immediately payable District Court sanction orders are void ab initio because of the Supreme Court's holding in McKnight v. General Motors Corp., ____ U.S. ____, 114 S.Ct. 1826, 128 L.Ed.2d 655 (1994) (per curiam) (appeal not "frivolous" where the only basis for the order imposing sanctions on petitioner's attorney was that his argument was foreclosed by circuit precedent). In Mr. Smith's motion to vacate, his attorney, Phillip S. Figa, said: "The McKnight case recognizes that Mr. Smith is absolutely, 100% not guilty of sanctionable misconduct for filing the interlocutory appeals with this Court which formed the basis for his suspension."

On February 2, 1995, the District Court disciplinary panel held another hearing and denied Mr. Smith's motion to continue its (September 21, 1994) disciplinary order, including the provision of its order staying the Committee on Conduct's (December 8, 1993) suspension of him from the practice of law in the District Court, nunc pro tunc to November 29, 1993. At the time of this hearing and denial, Judges Finesilver and Carrigan were no longer members of the District Court disciplinary panel, and had been replaced by United States District Judge Edward W. Nottingham, who had previously imposed harsh and unjustified sanctions against Mr. Smith in Dunkin, and United States District Judge Daniel B. Sparr, who had previously imposed harsh and unjustified sanctions against Mr. Smith in Casillan. Judge Weinshienk, who had previously imposed harsh and unjustified sanctions against Mr. Smith in Qualls v.

Regional Transportation District, Civil Action No. 91-Z-989 (D. Colo.), remained as a member of the District Court disciplinary panel.

On February 10, 1995, the recomposed District Court disciplinary panel issued its disciplinary order imposing "identical" discipline against Mr. Smith as that imposed against him by the Tenth Circuit disciplinary panel, and suspending him from the practice of law in the District Court pursuant to D.C.COLO.LR 83.6P. (the local rule dealing with discipline by other courts, in this case the Tenth Circuit). The District Court disciplinary panel required Mr. Smith to forward his certificate of admission to the Clerk of the Court within ten days, and forbade him to "hold himself out as an attorney admitted to practice in this court be it by use of letterhead, business cards, advertisement or any other manner." The District Court disciplinary panel stated that "when the United States Court of Appeals for the Tenth Circuit lifts its suspension of Mr. Smith, he shall be required to apply for reinstatement in accordance with D.C.COLO.LR 83.6N. of the Local Rules of Practice of this court."

On July 18, 1995, the Tenth Circuit disciplinary panel issued its one-sentence order denying Mr. Smith's (November 29, 1994) motion to vacate the Tenth Circuit disciplinary panel's (November 29, 1993) disciplinary order. The Tenth Circuit disciplinary panel also issued its orders disciplining Mr. Smith for filing interlocutory appeals in Qualls v. Regional Transportation District, et al., supra and Howard v. Mail-Well Envelope Company, et

al., Civil Action No. 93-Z-1895 (D. Colo.). The Tenth Circuit disciplinary panel issued its orders requiring Mr. Smith to show cause why he should not be disciplined for writing briefs in Qualls, Howard, Dunkin, and Seales v. Jefferson County School District R-1, Civil Action No. 95-N-189 (D. Colo.), and in every other case since November 29, 1993 in which Mr. Smith and/or one of his clients pro se has filed a brief in the Tenth Circuit.

II. ARGUMENT

Before issuing its (November 29, 1993) disciplinary order, the Tenth Circuit disciplinary panel denied Mr. Smith's request pursuant to Section 7 of the Plan for Attorney Disciplinary Enforcement of the United States Court of Appeals for the Tenth Circuit to be heard in person in defense and in mitigation with respect to the charges being brought against him by the disciplinary panel. (See also Fed. R. App. P. 46(b) and (c), requiring a hearing, if requested, before taking any appropriate disciplinary action against any attorney.) In that request, Mr. Smith said:

> Since [Mr. Smith's] case in defense and in mitigation will require presentation of extensive evidentiary materials, including expert testimony, . . . [Mr. Smith] requests the Disciplinary Panel to vacate the hearing and oral argument set for November 12, 1993, and to hold an evidentiary hearing [emphasis in the original] at some future date after . . . [Mr. Smith] has been given the opportunity to prepare his case. Alternatively, . . .[Mr. Smith] requests the Panel to designate a

special master for purposes of conducting an evidentiary hearing.

As the direct result of the Tenth Circuit disciplinary panel's denial of an evidentiary hearing to Mr. Smith after notice and a reasonable opportunity to prepare his case, he was unable to present expert testimony or otherwise make a proper record on the issue of whether the appeals in the four civil rights cases were "frivolous." Mr. Smith was therefore deprived of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living, in violation of his right to Fifth Amendment due process of law.

The Tenth Circuit disciplinary panel's (November 29, 1993) disciplinary order convicted Mr. Smith of filing "frivolous" appeals in four civil rights cases originally filed in the United States District Court for the District of Colorado. See In re David L. Smith, supra. Three of the four appeals (Dunkin, DeHerrera and Sandlin) involved the issue of whether an immediately payable district court sanction order is immediately appealable. See In re David L. Smith, supra. The Tenth Circuit disciplinary panel held that this issue is foreclosed by circuit precedent prohibiting such an appeal. See G.J.B. & Assoc. v. Singleton, 913 F.2d 824 (10th Cir. 1990). However, at the time Mr. Smith filed the appeals in Dunkin, DeHerrera and Sandlin, the Supreme Court had not yet ruled on the issue of whether an immediately payable district court sanction order is immediately appealable. Indeed, the Supreme Court has still not ruled on this issue. Applying

McKnight, filing an appeal was the only way Mr. Smith could preserve this issue pending a possible favorable decision by the Supreme Court. The answer to this question was not so clear as to make Mr. Smith's position in Dunkin, DeHerrera or Sandlin "frivolous" or sanctionable.

As the Tenth Circuit acknowledged in G.J.B., there is a circuit conflict on the question of whether an immediately payable district court sanction order is immediately appealable under the collateral order exception to the final judgment rule set forth in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). The majority of circuits permit such an appeal. See, e.g., Eavenson, Auchmuty & Greenwald v. Holtzman, 775 F.2d 535 (3rd Cir. 1985) (leading case); Frazier v. Cast, 771 F.2d 259, 261-62 (7th Cir. 1985) (fee award imposed on attorney is appealable collateral order); TMF Tool Co., Inc. v. Muller, 913 F.2d 1185, 1189 (7th Cir. 1990) (referring to conclusion of sanctions matters as final for appealability purposes); Riverhead Sav. Bank v. National Mortgage Equity Corp., 893 F.2d 1109, 1113 (9th Cir. 1990) ("[a] sanctions order imposed solely on a non-party to pay attorney's fees and costs falls within the collateral order exception to the finality rule and is appealable immediately as a final order"); Aetna Life Ins. Co. v. Alla Medical Servs., Inc., 855 F.2d 1470, 1473 (9th Cir. 1988) ("sanction orders issued solely against non-party attorneys are immediately appealable"); Rachel v. Banana Republic, Inc., 831 F.2d 1503, 1508 n. 5 (9th Cir. 1987) ("[a]n order imposing sanctions upon counsel, a nonparty, is final and appealable by the person sanctioned upon

imposition of the sanction."); Unioil, Inc. v. E.F. Hutton & Co., Inc., 809 F.2d 548, 556 (9th Cir. 1986) (fee award against counsel is immediately appealable), cert. denied, 484 U.S. 823, 108 S.Ct. 85, 98 L.Ed.2d 47 (1987); DeSisto College, Inc. v. Line, 888 F.2d 755, 761-63 (11th Cir. 1989), cert. denied, 495 U.S. 952, 110 S.Ct. 2219, 109 L.Ed.2d 544 (1990) (fee award against counsel appealable); Ortho Pharmaceutical Corp. v. Sona Distributors, 847 F.2d 1512, 1515 (11th Cir. 1988) ("[w]hen a Rule 11 sanction directs a non-party (jointly and severally with parties to the action or alone) to pay immediately--that is, before entry of final judgment--significant attorney fees and costs, this court has jurisdiction to hear immediate appeal of the sanction order"); Westmoreland v. CBS, Inc., 770 F.2d 1168, 1172 (D.C. Cir. 1985) (fee award against a former counsel is appealable collateral order).

While the Tenth Circuit is one of a small minority of circuits that does not permit such an appeal, filing immediate appeals of immediately payable District Court sanction orders was the only way Mr. Smith could preserve this issue pending a possible favorable decision by the Supreme Court. Again applying McKnight, the answer to this question is not so clear as to make Mr. Smith's immediate appeals in Dunkin, DeHerrera and Sandlin "frivolous" or sanctionable. The Tenth Circuit disciplinary panel's (November 29, 1993) disciplinary order convicting Mr. Smith of filing "frivolous" appeals in these civil rights cases was therefore void ab initio.

The fourth appeal filed by Mr. Smith (Casillan) did not involve the issue of whether an immediately payable district court sanction order is immediately appealable; but the Tenth Circuit disciplinary panel adopted the Tenth Circuit hearing panel's conclusion that the appeal was "frivolous" and should never have been filed. While the reasons, if any, for the Tenth Circuit hearing panel's conclusion were never made clear, filing an appeal was, once again, the only way Mr. Smith could preserve the issue raised on appeal pending a possible favorable decision by the Supreme Court. Again applying McKnight, the answer to this question is not so clear as to make Mr. Smith's appeal in Casillan "frivolous" or sanctionable. The Tenth Circuit disciplinary panel's (November 29, 1993) disciplinary order convicting Mr. Smith of filing a "frivolous" appeal in Casillan was therefore void ab initio.

In Casillan, the opposing parties and their attorneys failed to request sanctions to be imposed against Mr. Smith for filing and pursuing an alleged "frivolous" appeal; and the Tenth Circuit hearing panel that imposed sanctions against him failed to issue an order to show cause why sanctions should not be imposed, and failed to provide him with a reasonable opportunity to file a brief or otherwise be heard before sanctions were imposed--all in violation of the procedural due process requirements established by the Tenth Circuit in Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987). See also White v. General Motors Corp., Inc., 908 F.2d 675 (10th Cir. 1990) (standards for imposing attorney sanctions). Mr. Smith was therefore deprived of his

Fifth Amendment due process rights to notice that sanctions were being considered and a subsequent opportunity to respond before final judgment.

The Tenth Circuit disciplinary panel denied Mr. Smith's request to reconsider whether the appeals in the four civil rights cases were "frivolous," holding that "[w]e are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court." [Citations omitted.] See In re David L. Smith, supra. However, this denial and holding were contrary to 10th Cir. R. 36.3, which provided that "[u]npublished opinions and orders and judgments of this court have no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel." This denial and holding also created an irrebuttable presumption of guilt that deprived Mr. Smith of his Fifth Amendment right to due process of law.

Assuming arguendo that Mr. Smith is guilty as charged and convicted by the Tenth Circuit disciplinary panel of filing "frivolous" appeals in Dunkin, DeHerrera, Sandlin and Casillan, still, the punishment that has been imposed against him (i.e., pay up or be suspended from practice indefinitely) is incredibly severe, amounting to Eighth Amendment "cruel and unusual" punishment. In this connection, it should be recognized that except for the period of time during which the first District Court disciplinary panel stayed the unauthorized suspension of Mr. Smith by the Committee on Conduct, he has been suspended

from practice in the Tenth Circuit and the District Court since November 29, 1993. Upon information and belief, no other attorney has ever been punished as severely as Mr. Smith has for the kind of misconduct (if any) established against him in the Tenth Circuit and District Court disciplinary actions.

Before issuing its (July 18, 1995) order disciplining Mr. Smith for filing interlocutory appeals in Qualls and Howard, the Tenth Circuit disciplinary panel again failed or refused to hold a hearing or otherwise follow the Plan for Attorney Disciplinary Enforcement. However, the stay orders, trial cancellations, threats of counsel removal and other punitive actions of Judge Weinshienk which were the subject of the interlocutory appeals in Qualls and Howard constituted retroactive or ex post facto applications of D.C.COLO.LR. 83.6P., which is unconstitutional on its face; and deprived Mr. Smith of his right to represent his clients in accordance with the terms of their contingent fee agreements.[1] See

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[1]After the Tenth Circuit disciplinary panel issued its (November 29, 1993) disciplinary order, Judges Weinshienk, Nottingham and Sparr, and United States District Judge Lewis T. Babcock, took numerous punitive actions against Mr. Smith and his clients in pending civil rights litigation. For example, on January 17, 1995, Judge Nottingham issued his memorandum opinion and order refusing to dismiss Dunkin on the terms and conditions agreed to by the parties and their attorneys in their settlement and stipulation of dismissal, including their agreement that the sanctions imposed against Mr. Smith would be vacated and/or dismissed with

United States v. Dickstein, 971 F.2d 446, 451 (10th Cir. 1992). These punitive actions also deprived Mr. Smith's clients' of their First Amendment rights to pursue federal civil rights litigation. See NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) ("[a]nd under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances"); Brotherhood of Railroad

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prejudice nunc pro tunc to the date of their imposition. Judge Babcock issued a similar order on January 30, 1995 in DeHerrera. Because of these orders, Mr. Smith cannot demonstrate that the sanction orders in Dunkin and DeHerrera have been satisfied for purposes of complying with the Tenth Circuit disciplinary panel's (November 29, 1993) disciplinary order, which states that he may apply for reinstatement to the Tenth Circuit bar "when he can demonstrate that each sanction order of the Tenth Circuit and the District Court has been satisfied." These orders, as well as the sanction orders in Dunkin, DeHerrera and Casillan, are on appeal to the Tenth Circuit. The sanction order in Sandlin was satisfied on July 28, 1995 by Mr. Smith's wife, who was surety on his appeal bond in that case. In addition, Mr. Smith's wife has paid more than $51,000.00 to Mr. Figa on his outrageously excessive bill of more than $87,000.00. Mr. Figa has withdrawn from Mr. Smith's cases. Because of his lengthy suspension from practice, Mr. Smith is still financially unable to pay any monetary sanctions.

Trainmen v. Virginia, 377 U.S. 1, 84 S.Ct. 1113, 12 L.Ed.2d 89 (1964); United Mine Workers v. Illinois, 389 U.S. 217, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967); United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 91 S.Ct. 1076, 28 L.Ed.2d 339 (1971); Bill Johnson's Restaurants v. NLRB, 461 U.S. 731, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983); Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 104 S.Ct. 2803, 81 L.Ed.2d 732 (1984). This is especially true for Mr. Smith's clients, who are financially unable to hire substitute counsel, and are incompetent to proceed pro se against experienced defense counsel. The Tenth Circuit disciplinary panel's failure or refusal to hold a hearing or otherwise follow the Plan for Attorney Disciplinary Enforcement before issuing its (July 18, 1995) order disciplining Mr. Smith for filing interlocutory appeals in Qualls and Howard therefore deprived him of his Fifth Amendment right to due process of law.

By issuing its (July 18, 1995) orders requiring Mr. Smith to show cause why he should not be disciplined for writing briefs in Qualls, Howard, Dunkin, and Seales, and in every other case since November 29, 1993 in which Mr. Smith and/or one of his clients pro se has filed a brief in the Tenth Circuit, the Tenth Circuit disciplinary panel is continuing its pattern of bad faith harassment of Mr. Smith and his clients. The disciplinary panel cited Johnson v. County Commissioner, 868 F. Supp. 1226 (D. Colo. 1994). However, as the disciplinary panel well knows, Mr. Smith has never participated in the writing of a brief for a pro se litigant without disclosing his participation, and has never refused to sign a brief written by him when requested to do

so by any court. This includes the briefs in Qualls, Howard, Dunkin, and Seales, and in every other case since November 29, 1993 in which Mr. Smith and/or one of his clients pro se has filed a brief in the Tenth Circuit.

III. CONCLUSION

Ms. Howard and Mr. Smith request the Tenth Circuit to grant their petition for rehearing, and to grant such other and further relief as may be just under the circumstances, including an order reinstating Mr. Smith to practice in the Tenth Circuit and District Court and expunging his disciplinary convictions from the public record.

IV. SUGGESTION FOR REHEARING EN BANC

I express a belief based on a reasoned and studied professional judgment that the panel decision is contrary to the following decisions of the Supreme Court or of the United States Court of Appeals for the Tenth Circuit, and consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: McKnight v. General Motors Corp., ____ U.S. __, 114 S.Ct. 1826, 128 L.Ed.2d 655 (1994) (per curiam); Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987); White v. General Motors Corp., Inc., 908 F.2d 675 (10th Cir. 1990).

I express a belief based on a reasoned and studied professional judgment that this appeal involves one or more questions of exceptional importance: (1) Whether the Tenth Circuit disciplinary panel's (November 29, 1993) disciplinary order was void ab

initio because of the Supreme Court's holding in McKnight; (2) Whether as the direct result of the Tenth Circuit disciplinary panel's denial of an evidentiary hearing to Mr. Smith after notice and a reasonable opportunity to prepare his case, he was unable to present expert testimony or otherwise make a proper record on the issue of whether the appeals in the four civil rights cases were "frivolous," and was therefore deprived of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living, in violation of his right to Fifth Amendment due process of law; (3) Whether the Tenth Circuit disciplinary panel's denial of Mr. Smith's request to reconsider whether the appeals in the four civil rights cases were "frivolous," and its holding that "[w]e are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court," were contrary to 10th Cir. R. 36.3, which provided that "[u]npublished opinions and orders and judgments of this court have no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel"; (4) Whether this denial and holding also created an irrebuttable presumption of guilt that deprived Mr. Smith of his Fifth Amendment right to due process of law; (5) Whether the punishment that has been imposed against Mr. Smith (i.e., pay up or be suspended from practice indefinitely) is incredibly severe, amounting to Eighth Amendment "cruel and unusual" punishment; (6) Whether the Tenth Circuit disciplinary panel's failure or refusal to hold a hearing or otherwise

follow the Plan for Attorney Disciplinary Enforcement before issuing its (July 18, 1995) order disciplining Mr. Smith for filing interlocutory appeals in Qualls and Howard deprived him of his Fifth Amendment right to due process of law; (7) Whether by issuing its (July 18, 1995) orders requiring Mr. Smith to show cause why he should not be disciplined for writing briefs in Qualls, Howard, Dunkin, and Seales, and in every other case since November 29, 1993 in which Mr. Smith and/or one of his clients pro se has filed a brief in the Tenth Circuit, the Tenth Circuit disciplinary panel is continuing its pattern of bad faith harassment of Mr. Smith and his clients.

Dated this 1st day of August, 1995.

Respectfully submitted,

Linda C. Howard Plaintiff-Appellant 5373 Wheeling Street Denver, Colorado 80239 (303) 744-4165	David L. Smith Attorney-Appellant 1630 Welton Street Suite 300 Denver, Colorado 80202 (303) 534-0153

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of August, 1995, true and correct copies of the foregoing Petition for Rehearing and Suggestion for Rehearing En Banc were placed in the United States mail, postage prepaid, addressed as follows:

Jeffery T. Johnson, Esq.
Brian M. Mumaugh, Esq.
HOLLAND & HART
555 17th Street, Suite 2900
Denver, Colorado 80202

Randall A. Constantine, Esq.
Amy L. Lloyd, Esq.
ELROD & THOMPSON
1500 Peachtree Center - South Tower
225 Peachtree Street, N.E.
Atlanta, Georgia 30303

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Zita L. Weinshienk

Civil Action No. 93-Z-1895

[September 7, 1995]

LINDA C. HOWARD,

Plaintiff,

v.

MAIL-WELL ENVELOPE COMPANY; BUTLER PAPER COMPANY; GEORGIA-PACIFIC CORPORATION; and GREAT NORTHERN NEKOOSA CORPORATION EMPLOYEE PROTECTION PLAN,

Defendants.

ORDER

This matter comes before the Court on Defendants' Application for Attorneys' Fees and Plaintiff's And Her Attorney's Motion To Clarify Status of Legal Representation, And Notice of Plaintiff's Inability To Comply With Amended Minute Order Dated July 21, 1995.

No objections were filed to defendants' request for attorneys fees. The Court has reviewed defendants' application and the supporting documentation and finds the request reasonable. See Ramos v. Lamm, 713 F.2d 546, 552 (10th Cir. 1983). The Court further finds that these fees should be assessed only against attorney David Smith, as plaintiff Linda Howard should not be penalized for her attorney's inappropriate litigation strategy.

Plaintiff is reminded that Mr. Smith is no longer licensed to practice in the United States District Court for the District of Colorado. The Court will therefore treat plaintiff's Motion To Clarify Status a motion filed pro se. Accordingly, it is

ORDERED that Defendants' Application For Attorneys' Fees is granted, and attorneys fees in the amount of $8,640.00 are assessed exclusively against David L. Smith. It is

FURTHER ORDERED that Plaintiff's And Her Attorney's Motion to Clarify Status Of Legal Representation, And Notice of Plaintiff's Inability to Comply With Amended Minute Order Dated July 21, 1995 will be treated as a pro se motion for extension of time to secure new counsel, and is granted to September 22, 1995. Plaintiff will be presumed to be handling this case pro se until new counsel enters an appearance. It is

FURTHER ORDERED that this Court will no longer accept any papers which have been signed by Mr. Smith.

It is strongly recommended that plaintiff obtain legal counsel. Names, addresses, and phone numbers of attorneys who have filed similar lawsuits are available in the Clerk's Office for the review and use of plaintiff. Plaintiff is particularly referred to the Colorado Bar Association's Bar Referral Service, 899 Logan, #408, Denver, CO 80203 (831-8000), for assistance in locating an attorney. If she cannot afford an attorney, plaintiff is referred to the Legal Aid Society of

Metropolitan Denver, 1905 Sherman Street, 4th Floor, Denver, CO 80203 (837-1313) and the Thursday Night Bar Program, 1905 Sherman Street, 4th Floor, Denver, CO 80203 (830-2119).

DATED at Denver, Colorado, this 7th day of September, 1995.

BY THE COURT:

_____

Zita L. Weinshienk, Judge
United States District Court

September 7, 1995

Civil Action No. 93-Z-1895

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the above date copies of ORDER entered by Judge Zita L. Weinshienk and filed on September 7, 1995, were mailed to the following:

Linda C. Howard
3600 Monroe
Denver, CO 80205

Brian M. Mumaugh, Esq.
Jeffrey T. Johnson, Esq.
Holland & Hart
D.C. Box No. 06

Randall A. Constantine, Esq.
Amy L. Lloyd, Esq.
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1500 Peachtree Center--South Tower
225 Peachtree Street, N.E.
Atlanta, Georgia 30303

Magistrate Judge Donald E. Abram

JAMES R. MANSPEAKER, Clerk

By:_____
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LINDA C. HOWARD,	)	
	)	
Plaintiff-Appellant	)	
	)	
v.	)	No. 95-1428
	)	(D.C. No. 93-D-1895)
	)	(Dist. of Colo.)
MAIL-WELL ENVELOPE COMPANY, BUTLER PAPER COMPANY, GEORGIA-PACIFIC CORPORATION, GREAT NORTHERN NEKOOSA CORPORATION EMPLOYEE PROTECTION PLAN,	)	
	)	
Defendants-Appellees-	)	
	)	
----------	)	
	)	
DAVID L. SMITH,	)	
	)	
Attorney-Appellant.	)	
	)	

ORDER
Filed: February 26, 1996

Before PORFILIO, ANDERSON, and EBEL,
Circuit Judges.

This matter comes on for consideration of the appellants' response to the notice of

jurisdictional defect issued by this court and their "Verified Motion for an Emergency Stay of Proceedings in the District Court Pending Appeal."

Upon consideration thereof, it is ordered that the appeal from the portion of the district court order pertaining to Mr. Smith's status as counsel in the case is dismissed for lack of jurisdiction. The order is analogous to one disqualifying counsel. Such an order is not immediately appealable. See Richardson-Merrell, Inc. v. Koller, 472 U.S. 424 (1985) (an order disqualifying counsel in a civil case is not immediately appealable); United States v. Dickstein, 971 F.2d 446 (10th Cir. 1992) (the revocation of pro hac vice status in a criminal case is not immediately appealable).

The court reserves judgment on the jurisdictional issue pertaining to the imposition of attorney fees. That issue is referred to the panel assigned to hear this appeal on the merits.

Accordingly, the plaintiff's appeal is DISMISSED. Mr. Smith's appeal of the imposition of sanctions shall proceed.

Briefing on the merits of the attorney fees issue shall proceed. The appellant filed his opening brief on November 27, 1995. The appellees shall file their answer brief within 30 days of the date of this order. Subsequent briefing shall proceed in accordance with the Tenth Circuit Rules of Court.

The appellants' motion for stay of proceedings in the district court is DENIED.

Entered for the Court,
Patrick Fisher, Clerk

Ellen Rich Reiter
Deputy Clerk, Appeals
Expediter

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LINDA C. HOWARD, Plaintiff-Appellant-Petitioner, v. MAIL-WELL ENVELOPE COMPANY, BUTLER PAPER COMPANY, GEORGIA-PACIFIC CORPORATION, GREAT NORTHERN NEKOOSA CORPORATION EMPLOYEE PROTECTION PLAN, Defendants-Appellees-Respondents, and, ZITA L. WEINSHIENK, United States District Judge, Respondent. ---------- DAVID L. SMITH, Attorney-Appellant-Petitioner.	No. 95-1428 (D.C. No. 93-D-1895) (Dist. of Colo.)

PETITION FOR REHEARING; MOTION FOR AN EMERGENCY STAY OF PROCEEDINGS IN THE DISTRICT COURT PENDING RESOLUTION OF PETITION FOR REHEARING; REQUEST FOR ORDER PERMITTING MR. SMITH TO REPRESENT MS. HOWARD IN THE TENTH CIRCUIT AND IN THE DISTRICT COURT ON A HARDSHIP BASIS; AND SUGGESTION FOR REHEARING EN BANC

Linda C. Howard and David L. Smith hereby file the following Petition for Rehearing; Motion for an Emergency Stay of Proceedings in the District Court Pending Resolution of Petition for Rehearing; Request for Order Permitting Mr. Smith to Represent Ms. Howard in the Tenth Circuit and in the District Court on a Hardship Basis; and Suggestion for Rehearing En Banc:

I. PETITION FOR REHEARING; MOTION FOR AN EMERGENCY STAY OF PROCEEDINGS IN THE DISTRICT COURT PENDING RESOLUTION OF PETITION FOR REHEARING; AND REQUEST FOR ORDER PERMITTING MR. SMITH TO REPRESENT MS. HOWARD IN THE TENTH CIRCUIT AND IN THE DISTRICT COURT ON A HARDSHIP BASIS

On February 26, 1996, a three-judge hearing panel of the United States Court of Appeals for the Tenth Circuit (composed of Porfilio, Anderson, and Ebel, Circuit Judges) issued its (unpublished) order (copy

attached hereto) dismissing for lack of jurisdiction Ms. Howard's and Mr. Smith's appeal of orders issued by United States District Judge Zita L. Weinshienk.[2] The

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[2]The orders being appealed include: (1) Judge Weinshienk's (May 15, 1995 and July 21, 1995) orders removing Mr. Smith as Ms. Howard's attorney and lifting the stay in Ms. Howard's civil rights case; (2) Judge Weinshienk's (September 7, 1995) order granting defendants' application for attorney fees and imposing attorney fee sanctions of $8,640.00 against Mr. Smith exclusively for filing and pursuing an appeal of her (June 17, 1994) order staying Ms. Howard's civil rights case "until final action is taken on the Committee on Conduct's recommendation concerning plaintiff's counsel's status," and vacating the jury trial scheduled to commence on August 1, 1994; treating Ms. Howard's and Mr. Smith's motion to clarify status of legal representation, and notice of Ms. Howard's inability to comply with Judge Weinshienk's (July 21, 1995) amended minute order as a pro se motion for extension of time to secure new counsel, and granting the motion to September 22, 1995; announcing that "[p]laintiff will be presumed to be handling this case pro se until new counsel enters an appearance," and that "this Court will no longer accept any papers which have been signed by Mr. Smith"; and refusing to rule on Ms. Howard's and Mr. Smith's request for proper notice, an opportunity to file a brief and a hearing after the Tenth Circuit has disposed of their appeal in this case (including their petition for rehearing and suggestion for rehearing en banc), and has issued its mandate

hearing panel denied Ms. Howard's and Mr. Smith's Verified Motion for an Emergency Stay of Proceedings in the District Court Pending Appeal, and refused to address (and therefore denied) Ms. Howard's and Mr. Smith's Petition for a Writ of Mandamus or Prohibition, which requested alternative relief for the numerous constitutional violations and gross abuses of discretion committed by Judge Weinshienk.

In its (February 26, 1996) order, the hearing panel announced that "[t]he order is analogous to one disqualifying counsel," and that "[s]uch an order is not immediately appealable." While Ms. Howard and Mr. Smith acknowledge that orders disqualifying counsel are not immediately appealable, they submit that the orders being appealed are immediately appealable if in addition to being analogous to orders disqualifying counsel, they are immediately appealable injunctions under 28 U.S.C. § 1292(a)(1), or they are otherwise immediately appealable. For example, in their opening brief, Ms. Howard and Mr. Smith argued that due to the fact that the orders being appealed merely continue the recomposed District Court disciplinary panel's (February 10, 1995) disciplinary order prohibiting Mr. Smith from practicing law in the District Court, they do not only relate to the conduct or progress of litigation before Judge Weinshienk in this case; they also relate to the conduct or progress of attorney disciplinary proceedings before the recomposed District Court disciplinary panel. The orders being appealed are therefore immediately appealable injunctions

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pursuant to Fed. R. App. P. 41(a).

under 28 U.S.C. § 1292(a)(1). See Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 279, 108 S.Ct. 1133, 99 L.Ed.2d 296 (1988); see also Tri-State Generation & Transmission Assoc. v. Shoshone River Power, Inc., 874 F.2d 1346, 1351 (10th Cir. 1989); Mai Basic Four, Inc. v. Basis, Inc., 962 F.2d 978, 980-83 (10th Cir. 1992).

Ms. Howard and Mr. Smith also argued that by participating (as a member of the recomposed District Court disciplinary panel) in the decision to issue the (February 10, 1995) disciplinary order imposing "identical" discipline against Mr. Smith as that imposed against him by the Tenth Circuit disciplinary panel in its (November 29, 1993) disciplinary order, and suspending him from the practice of law in the District Court pursuant to D.C.COLO.LR 83.6P., Judge Weinshienk, in effect, disbarred Mr. Smith, who may apply for reinstatement when he can demonstrate that each sanction order of the Tenth Circuit and the District Court has been satisfied--an impossible task due to the order of United States District Judge Edward W. Nottingham refusing to dismiss Dunkin v. Louisiana-Pacific Corporation, et al., No. 95-1087 (10th Cir.) on the terms and conditions agreed to by the parties and their attorneys in their settlement and stipulation of dismissal, including their agreement that the sanctions imposed against Mr. Smith would be vacated and/or dismissed with

prejudice nunc pro tunc to the date of their imposition.[3] The orders being appealed are therefore immediately appealable under the exception to the final judgment rule established by the Tenth Circuit in Burkett v. Chandler, 505 F.2d 217 (10th Cir. 1974), cert. denied, 423 U.S. 876, 96 S.Ct. 149, 46 L.Ed.2d 110 (1975).

Ms. Howard and Mr. Smith argued that the orders being appealed are immediately appealable district court sanction orders under the collateral order exception to the final judgment rule set forth in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed.2d 1528 (1949). See, e.g., Eavenson, Auchmuty & Greenwald v. Holtzman, 775 F.2d 535 (3rd Cir. 1985) (leading case); Frazier v. Cast, 771 F.2d 259, 261-62 (7th Cir. 1985) (fee award imposed on attorney is appealable collateral order); TMF Tool Co., Inc. v. Muller, 913 F.2d 1185, 1189 (7th Cir. 1990) (referring to conclusion of sanctions matters as final for appealability purposes); Riverhead Sav. Bank v. National Mortgage Equity Corp., 893 F.2d 1109, 1113 (9th Cir. 1990) ("[a] sanctions order imposed solely on a non-party to pay attorney's fees and costs falls within the collateral order exception to the finality rule and is appealable immediately as a final order"); Aetna Life Ins. Co. v. Alla Medical Servs., Inc., 855 F.2d 1470, 1473 (9th Cir. 1988) ("sanction orders issued solely against non-party attorneys

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[3]Following Judge Nottingham's lead, United States District Judge Lewis T. Babcock issued a similar order in DeHerrera v. City and County of Denver, et al., No. 95-1110 (10th Cir.).

are immediately appealable"); Rachel v. Banana Republic, Inc., 831 F.2d 1503, 1508 n. 5 (9th Cir. 1987) ("[a]n order imposing sanctions upon counsel, a nonparty, is final and appealable by the person sanctioned upon imposition of the sanction."); Unioil, Inc. v. E.F. Hutton & Co., Inc., 809 F.2d 548, 556 (9th Cir. 1986) (fee award against counsel is immediately appealable), cert. denied, 484 U.S. 823, 108 S.Ct. 85, 98 L.Ed.2d 47 (1987); DeSisto College, Inc. v. Line, 888 F.2d 755, 761-63 (11th Cir. 1989), cert. denied, 495 U.S. 952, 110 S.Ct. 2219, 109 L.Ed.2d 544 (1990) (fee award against counsel appealable); Ortho Pharmaceutical Corp. v. Sona Distributors, 847 F.2d 1512, 1515 (11th Cir. 1988) ("[w]hen a Rule 11 sanction directs a non-party (jointly and severally with parties to the action or alone) to pay immediately--that is, before entry of final judgment--significant attorney fees and costs, this court has jurisdiction to hear immediate appeal of the sanction order"); Westmoreland v. CBS, Inc., 770 F.2d 1168, 1172 (D.C. Cir. 1985) (fee award against a former counsel is appealable collateral order). But see G.J.G. & Assoc.

v. Singleton, 913 F.2d 824 (10th Cir. 1990) (district court sanction orders are not immediately appealable).[4]

In their Verified Motion for an Emergency Stay of Proceedings in the District Court Pending Appeal, Ms. Howard and Mr. Smith further argued that the District Court is without jurisdiction to proceed during the pendency of their appeals, which do not involve "non-appealable" orders and are not "frivolous." Ms. Howard and Mr. Smith argued that the likelihood of success on appeal is high due to the fact that Judge Weinshienk refused to give them a full and fair opportunity (or any opportunity) to litigate the

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[4]Due to the fact that this split in the circuits has not been resolved by the Supreme Court, it is not "frivolous" to argue that the orders being appealed are immediately appealable district court sanction orders under the collateral order exception to the final judgment rule set forth in Cohen. See McKnight v. General Motors Corporation, ____ U.S.__ _, 114 S.Ct. 1826, 128 L.Ed.2d 655 (1994); but see In re David L. Smith, 10 F.3d 723 (10th Cir. 1993) ("frivolous"). The Tenth Circuit continues to refuse to address Mr. Smith's arguments that the Tenth Circuit disciplinary panel's (November 29, 1993) disciplinary order suspending him indefinitely from the practice of law in the Tenth Circuit was void ab initio, and that it is no longer equitable that this disciplinary order should have prospective application because of the Supreme Court's opinion in McKnight.

constitutional issues relating to the orders being appealed. Ms. Howard and Mr. Smith argued that there is a threat of irreparable harm to them if the emergency stay or injunction is not granted. Ms. Howard, who is financially unable to hire substitute counsel and is incompetent to proceed pro se against experienced defense counsel, will be deprived of her First Amendment right to pursue federal civil rights litigation. Mr. Smith will be deprived of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living, including his right to represent Ms. Howard in accordance with the terms of their contingent fee agreement, in violation of his Fifth Amendment right to due process of law. Ms. Howard and Mr. Smith argued that there is an absence of harm to the opposing parties if the emergency stay or injunction is granted, and that there is no risk of any harm to the public interest.[5]

By failing or refusing to address Ms. Howard's and Mr. Smith's arguments, as well as the availability of the alternative relief requested by them in their Petition for a Writ of Mandamus or Prohibition for the numerous constitutional violations and

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[5]Mr. Smith is a member in good standing of the Bar of the State of Colorado. To date, the Supreme Court of Colorado has not seen fit to impose reciprocal discipline against Mr. Smith based on the Tenth Circuit disciplinary panel's (November 29, 1993) disciplinary order or on the District Court disciplinary panel's (February 10, 1995) disciplinary order.

gross abuses of discretion committed by Judge Weinshienk, the hearing panel has deprived them of their Fifth Amendment due process right to a full and fair opportunity to litigate these matters, including their Article III right to a meaningful appellate decision. The hearing panel has also deprived Ms. Howard and Mr. Smith of their right to an appellate decision that is sufficiently specific to permit Supreme Court review on a petition for a writ of certiorari.

For these reasons, Ms. Howard and Mr. Smith request an order granting their Petition for Rehearing; Motion for an Emergency Stay of Proceedings in the District Court Pending Resolution of Petition for Rehearing; and Request for Order Permitting Mr. Smith to Represent Ms. Howard in the Tenth Circuit and in the District Court on a Hardship Basis. Ms. Howard and Mr. Smith request such other and further relief as may be just under the circumstances, including an emergency stay of the orders suspending and disbarring him

from the practice of law in the Tenth Circuit and in the District Court pending resolution of their petition for rehearing.[6]

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[6]On February 13, 1996, a three-judge disciplinary panel of the United States Court of Appeals for the Tenth Circuit (composed of Seymour, Chief Judge, Baldock and Brorby, Circuit Judges) issued its (published) order finding Mr. Smith guilty of writing briefs and otherwise assisting his clients (including Ms. Howard) with their appeals from the United States District Court for the District of Colorado to the Tenth Circuit. The disciplinary panel denied Mr. Smith's request for an evidentiary hearing, but convicted him for violating its (November 29, 1993) suspension order and practicing law in the Tenth Circuit without authorization. The disciplinary panel disbarred Mr. Smith from the practice of law in the Tenth Circuit, but refused to address his complaints of judicial misconduct pursuant to 28 U.S.C. § 372(c). Mr. Smith has filed a Verified Petition for Rehearing, Motion for an Emergency Stay of Suspension and Disbarment Orders Pending Resolution of Petition for Rehearing, and Suggestion for Rehearing En Banc with respect to the disciplinary panel's (February 13, 1996) order.

On February 16, 1996, a three-judge hearing panel of the United States Court of Appeals for the Tenth Circuit (composed of Tacha, Logan, and Kelly, Circuit Judges) issued its (unpublished) order and judgment affirming the disciplinary order issued by a three-judge disciplinary panel of the United States District Court for the District of Colorado on February 10, 1995. However,

II. SUGGESTION FOR REHEARING EN BANC

I express a belief based on a reasoned and studied professional judgment that the panel decision is contrary to the following decisions of the Supreme Court or of the United States Court of Appeals for the Tenth Circuit, and consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 279, 108 S.Ct. 1133, 99 L.Ed.2d 296 (1988); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed.2d 1528 (1949); Burkett v. Chandler, 505 F.2d 217 (10th Cir. 1974),

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instead of giving its own reasons for affirming this disciplinary order, the hearing panel found "no merit in any of the arguments raised on appeal," and approved the disciplinary order "for substantially the reasons given in . . . [the District Court disciplinary panel's] post-hearing order." The hearing panel then threatened Mr. Smith that "[c]ontinued attempts by . . . [him] to further litigate matters already determined by this court or foreclosed by previous determinations could result in the imposition of sanctions." Mr. Smith has filed a Verified Petition for Rehearing, Motion for an Emergency Stay of Suspension and Disbarment Orders Pending Resolution of Petition for Rehearing, and Suggestion for Rehearing En Banc with respect to the hearing panel's (February 16, 1996) order and judgment.

cert. denied, 423 U.S. 876, 96 S.Ct. 149, 46 L.Ed.2d 110 (1975); Tri-State Generation & Transmission Assoc. v. Shoshone River Power, Inc., 874 F.2d 1346, 1351 (10th Cir. 1989); Mai Basic Four, Inc. v. Basis, Inc., 962 F.2d 978, 980-83 (10th Cir. 1992).

I express a belief based on a reasoned and studied professional judgment that this case involves one or more questions of exceptional importance: (1) whether the orders being appealed are immediately appealable if in addition to being analogous to orders disqualifying counsel, they are immediately appealable injunctions under 28 U.S.C. § 1292(a)(1), or they are otherwise immediately appealable; (2) whether due to the fact that the orders being appealed merely continue the recomposed District Court disciplinary panel's (February 10, 1995) disciplinary order prohibiting Mr. Smith from practicing law in the District Court, they do not only relate to the conduct or progress of litigation before Judge Weinshienk in this case; they also relate to the conduct or progress of attorney disciplinary proceedings before the recomposed District Court disciplinary panel; (3) whether the orders being appealed are therefore immediately appealable injunctions under 28 U.S.C. § 1292(a)(1); (4) whether by participating (as a member of the recomposed District Court disciplinary panel) in the decision to issue the (February 10, 1995) disciplinary order imposing "identical" discipline against Mr. Smith as that imposed against him by the Tenth Circuit disciplinary panel in its (November 29, 1993) disciplinary order, and suspending him from the practice of law in the District Court pursuant to D.C.COLO.LR 83.6P., Judge Weinshienk, in effect,

disbarred Mr. Smith, who may apply for reinstatement when he can demonstrate that each sanction order of the Tenth Circuit and the District Court has been satisfied--an impossible task due to the order of United States District Judge Edward W. Nottingham refusing to dismiss Dunkin v. Louisiana-Pacific Corporation, et al., No. 95-1087 (10th Cir.) on the terms and conditions agreed to by the parties and their attorneys in their settlement and stipulation of dismissal, including their agreement that the sanctions imposed against Mr. Smith would be vacated and/or dismissed with prejudice nunc pro tunc to the date of their imposition; (5) whether the orders being appealed are therefore immediately appealable under the exception to the final judgment rule established by the Tenth Circuit in Burkett v. Chandler, 505 F.2d 217 (10th Cir. 1974), cert. denied, 423 U.S. 876, 96 S.Ct. 149, 46 L.Ed.2d 110 (1975); (6) whether the orders being appealed are immediately appealable district court sanction orders under the collateral order exception to the final judgment rule set forth in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed.2d 1528 (1949); (7) whether the District Court is without jurisdiction to proceed during the pendency of Ms. Howard's and Mr. Smith's appeals, which do not involve "non-appealable" orders and are not "frivolous"; (8) whether the likelihood of success on appeal is high due to the fact that Judge Weinshienk refused to give Ms. Howard and Mr. Smith a full and fair opportunity (or any opportunity) to litigate the constitutional issues relating to the orders being appealed; (9) whether there is a threat of irreparable harm to Ms. Howard and Mr. Smith if the emergency stay or

injunction is not granted; (10) whether Ms. Howard, who is financially unable to hire substitute counsel and is incompetent to proceed pro se against experienced defense counsel, will be deprived of her First Amendment right to pursue federal civil rights litigation; (11) whether Mr. Smith will be deprived of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living, including his right to represent Ms. Howard in accordance with the terms of their contingent fee agreement, in violation of his Fifth Amendment right to due process of law; (12) whether there is an absence of any harm to the opposing parties if the emergency stay or injunction is granted; (13) whether there is a risk of any harm to the public interest; (14) whether by refusing to address Ms. Howard's and Mr. Smith's arguments, as well as the availability of the alternative relief requested by them in their Petition for a Writ of Mandamus or Prohibition for the numerous constitutional violations and gross abuses of discretion committed by Judge Weinshienk, the hearing panel has deprived them of their Fifth Amendment due process right to a full and fair opportunity to litigate these matters, including their Article III right to a meaningful appellate decision; (15) whether the hearing panel has also deprived Ms. Howard and Mr. Smith of their right to an appellate decision that is sufficiently specific to permit Supreme Court review on a petition for a writ of certiorari; (16) whether Mr. Smith should be permitted to represent Ms. Howard in the Tenth Circuit and in the District Court on a hardship basis.

Dated this 11th day of March, 1996.

Respectfully submitted,

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PLAINTIFF-APPELLANT-PETITIONER	ATTORNEY-APPELLANT-PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of March, 1996, true and correct copies of the foregoing Petition for Rehearing; Motion for an Emergency Stay of Proceedings in the District Court Pending Resolution of Petition for Rehearing; Request for Order Permitting Mr. Smith to Represent Ms. Howard in the Tenth Circuit and in the District Court on a Hardship Basis; and Suggestion for Rehearing En Banc were placed in the United States mail, postage prepaid, addressed as follows:

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